be in its dangerous position fouling a main track of a busy railroad yard?

Do respondents contend that the opinion and ruling of the Illinois Appellate Court on the subject of petitioner's right to recover full damage, if the railroad company used a locomotive with a back-up light which was defective and out-of-order and failed to perform the function it was designed and intended to perform, as the jury was concededly warranted to find in this case, do not constitute a final, conclusive and binding bar, upon any new trial under that opinion, to petitioner's right to full damages because of the violation by the railroad company of the provisions of the Federal Boiler Inspection Act irrespective of negligence which any jury might conceivably attribute to petitioner?

Do respondents contend that on any new trial different or additional evidence can alter the basis or avoid the effect of the Appellate Court decision on this subject?

Can respondents suggest any new, different or additional evidence which would raise the bar to petitioner's right to recover under the Appellate Court's opinion for violation by the railroad company of the provisions of the Federal Boiler Inspection Act in using a locomotive in backward motion with a defective back-up or rear headlight?

Do respondents contend that the railroad company at any time during the trial claimed or asserted that it was entitled to any diminution of the damages to which petitioner undisputably is entitled because of its conceded negligence, regardless of the condition of the rear headlight, and regardless of the condition of the hand brake on the coal car, by reason of any contributory negligence on the part of petitioner?

The answers to these questions, which are self-evident and which respondent's briefs in this court make crystal clear, cry out to high heaven against the brazen, flaunting disregard by the Appellate and Supreme Courts of Illinois of the laws of the Congress and the Constitution of the United States, the laws and Constitution of the State of Illinois, and the clear, emphatic decisions of this Court.

On the question of petitioner's right to recover full damages for the violation by the railroad company of the provisions of the Federal Boiler Inspection Act, the respondent, while refraining from making a forthright admission that petitioner will be precluded on any new trial under the Appellate Court's opinion from recovering full damages for violation of the Federal Boiler Inspection Act, does not have the hardihood to contradict that proposition. Counsel indulges in the subterfuge that petitioner on a new trial may recover full damages by reason of the railroad company's violation of the Federal Safety Appliance Act because (Respondent's Brief in No. 125, p. 13) "Conceivably, he may introduce additional evidence that the brake was actually set 'with due care in the normal, natural and usual manner' "; and "That, contrary to what respondent's witnesses testified, the slope of the spur track was toward the main" and, therefore, the decisions of the Appellate Court is not final. This subterfuge is as illusory as it is insincere. It does not in any wise negative the proposition that petitioner has, by the Appellate Court's ruling, been denied the right to recover under the Federal Boiler Inspection Act.

As we have pointed out, there was no contest, and it was in effect admitted at the trial, that the brake on the coal car was inefficient, permitting it to drift from its safe position to its dangerous position (R. 56, ER. 8) and the evidence, admitted expressly without objection, which was withdrawn after it had been sustained by the trial court (R. 71, 73, ER. 23, 25), establishes the fact of the inefficiency of the brake on the coal car and its causal connection with petitioner's severe injuries.

Respondent's counsel in No. 125, apparently viewing the trial of a lawsuit as a game of ambush and ambuscade and with shocking insincerity and attempted deception, denies his admission that the brake on the coal car was defective.

Let us examine the record (R. 56, ER. 8):

> "Now I notice what Mr. Fuerst said about how the car got there. I don't know if it was put there, or whether it had drifted there.

"In other words, if the brakes were defective in holding the car. But I do know the car was too close to this track to clear a man riding on it. In other words, a man could get between there, but he would have to hunch in close * * *."

The record is devoid of any justification for the assertion in respondent's brief in No. 125, p. 6, that counsel made his opening statement to the jury before he had had an opportunity to interview his witnesses. It passes credulity that an experienced trial counsel of an eminent law firm representing a great railroad company did not interview his witnesses or learn the facts until he put them on the witness stand. Even if he were so negligent in preparing the defendant's case for trial, he nevertheless was the official spokesman for the defendant railroad company; and the court, the jury and opposing counsel were entitled to rely upon his statement in opening the case as to what were the issues that were to be tried. He never at any time, until after the jury had rendered its verdict, attempted to withdraw or sought to amend or correct that statement. On the contrary, he expressly withdrew objection after it had been sustained by the trial court (R. 73, ER. 25) to the question:

"Q. What would you say from the point that a brake was applied where you saw it applied when this car was in the clear to where the car was when you started to work with your engine and your body came in contact with that car whether that brake was efficient?

"Mr. Moir: I object to that if your Honor please.

"The Court: Objection sustained.

"Mr. Fuerst: May I respectfully——

"Mr. Moir: Just a minute, if your Honor please, I withdraw the objection. Proceed.

"The Court: All right.

"Mr. Moir: Have the question read.

(Question read)

"A. No, I would say it wasn't."

With respect to the statement in respondent's brief in No. 125, page 5, that "respondent vigorously contested any liability under the Safety Appliance Act at the trial," the lack of record references speaks eloquently of the falsity of this statement. On the contrary, the respondent railroad company did not offer any evidence whatsoever that the hand brake on the coal car was efficient. It did not call the brakeman who set the brake on the coal car when it was put in on the spur track as a witness. It did not call anybody who must have operated the brake after the accident to testify to its condition, and it is inconceivable that the coal car was left in its dangerous position after causing injury to one of respondent railroad company's employees. It did not call any car or brake inspector to testify to the condition of the hand brake. It did not produce any profile map showing the grade of the spur track, as it most certainly would have done if there were any honest question as to the direction of the grade of that track.

With respect to the present claim of respondent in No. 125 that the "only evidence as to the slope of the spur track was the testimony of three members of petitioner's crew that the spur track sloped 'away from the main track' and, therefore, 'the drift of the coal car toward the main track was impossible,' " the respondent railroad company in its reply in the Appellate Court of Illinois stated, on p. 7:

> "Reading the cold printed testimony of defendant's three witnesses, we concede that the words used by two of them (McKinney and Thomas) may be ambiguous as to whether the Clifford siding 'sloped' *up* or 'sloped' *down* from the O. P. Main. The testimony of Farr that the siding 'slopes *away from* the O. P. main' (Abst. 135) plainly connotes a downward slant away. McKinney said the track 'slopes to the West' (Abst. 124). This could mean either an uphill or downhill slant. Webster's New International Dictionary (2d ed.) gives as one of the definitions of the verb 'slope', 'to have a slant,' and as one of the definitions of the noun 'slope', 'up-

ward or downward slant or inclination.' Thomas said the Clifford siding has 'an incline to the West' (Abst. 138). In the same dictionary we find one of the meanings of 'incline', is 'ascent or descent'.

"If the only things we had to go by were those few words without the aid of Farr's testimony, we confess it might be embarrassing to tell which way the slant was."

The testimony of the fireman that the siding "sloped away from the O. P. main" literally and logically refers to horizontal distance and not to vertical direction. "An incline to the West" in ordinary lay language connotes a rise as the track proceeds in a westerly direction. "Slopes to the West" is meaningless as to whether it slopes up or down.

It is perfectly apparent from reading the record as a whole that there was no contest whatever with respect to the inefficiency of the brake of the hand car or the direction of the slope of the spur track. Respondent's claim in this respect is a pure afterthought conjured up on its combing the record after the trial and after the jury had rendered its verdict in an effort to secure a new trial.

There was no claim at the trial that the brake on the coal car was not inefficient or that the coal car did not drift from its safe to its dangerous position. With or without the admission of counsel in opening the case to the court and jury and the testimony to which we have referred, the photographs, Defendant's Exhibits 2 and 3, quite plainly reveal that the spur track, which is the one at the right of the photographs, rises as it comes into the foreground of the picture and away from the O. P. main. (R. 175-177).

The three defense witnesses, McKinney, Thomas and Farr, offered by the carrier respondent, as disclosed by the record, were so highly prejudiced and biased in favor of the respondent that their testimony can be likened unto potter's clay in the hands of respondent's counsel. Their own contradictions on the witness stand and likewise the

photographic exhibits clearly made their testimony in its entirety, unbelievable. If respondent's contentions had the basis of truth, can this Court conceive that with all the engineers in the employ of this carrier, not a single one was produced to testify with measurements or mathematical certainty regarding the pseudo condition of a grade claimed by the carrier for the first time, after the action was tried.

In the case of *Cusson* v. *Canadian Pacific Railway Company*, 115 Fed. 2d 430, the court held in a like situation that where a car was braked and then drifted from the position where it was braked, resulting in an accident and injury to the employee this was sufficient to raise a question of fact as to whether or not the brake on the car was efficient. There can be no question that the record in the case at bar discloses that the brake on the coal car that fouled the O. P. main track was inefficient and violated the Safety Appliance Act, with or without an admission that the brake was inefficient at the commencement of the trial.

The Illinois Appellate Court, therefore, deprived this petitioner both of his constitutional rights and the protection intended and provided for him under the Federal Safety Appliance Act.

## ARGUMENT

## THE MERITS

### I.

**Respondent's Contention That It Was Deprived of the Defense of Contributory Negligence is Wholly Untenable Even Though There Had Not Been Any Violation by the Respondent of Its Duty to Comply With the Federal Boiler Inspection and Federal Safety Appliance Acts.**

The Illinois Courts flagrantly and erroneously violated both the Constitution and Laws of the United States by their refusal to conform to the federal decisional law on both the Federal Boiler Inspection and Federal Safety Appliance Acts; and by their arbitrary denial of petitioner's

indisputable rights thereunder, have opened a contention that under the Federal Employers' Liability Act the respondent may have been deprived of the defense of contributory negligence.

The carrier respondent under both the Federal Boiler Inspection Act and the Safety Appliance Act is deprived of the defense of contributory negligence when either or both of these acts are violated.

Let us therefore consider this false and baseless claim of contributory negligence defense, as is now claimed by the respondent.

The record discloses these facts:

Before midnight on November 14, 1946, petitioner, in the performance of his duties, was crushed and rolled for a distance of five to ten feet or more, in the narrow space of three to six to not more than ten inches wide between the side of a tender backing on a main track in respondent's dark and unlit yard. The side of a fouling car on a spur track was admittedly too close to the main track to provide safe and sufficient clearance.

Now, the respondent in face of this admitted testimony of entrapment seeks a brass ring on his legalistic carousel, idem est, another opportunity to have another jury pass upon the question of the amount of its admitted liability to this petitioner on the pretended premises that another jury might award a lesser sum on the alleged unfounded claim of contributory negligence. This imaginary claim can only be created on the theory that petitioner failed to see the dangerous position of the coal car during the night in an unlit yard before his accident. Likewise, it may be claimed that his failure to undertake to jump off the moving tender from the dangerous position created by the fouling of the main right of way by the coal car was negligence.

The respondent railroad company's negligence in permitting the fouling of its track by the coal car is admitted. The gross and almost criminal negligence of the engineer in failing to stop the movement which, according to his own

testimony, he could have done in one-third of the distance the engine traveled after he saw the dangerous position of the coal car was proven by his own testimony. (R. 194-8).

If, as the Appellate Court states, the jury was entitled to find that the rear headlight was out of focus, the negligence of the respondent railroad company in not repairing it is a definite issue of negligence, apart from any question of violation of the Boiler Inspection Act.

The general foreman of the respondent railroad company in charge of maintenance of locomotives testified that where there is a defect in the headlight, a new one could be put in, in approximately ten minutes; likewise, a defect in the reflector, it would take forty-five minutes to change it; and if there is a defect in the wiring of the socket of the bulb, it takes about thirty minutes to replace the socket. (R. 214-5).

Is it conceivable that under these circumstances of gross and multiple negligence that a jury can be found that would attribute negligence to this petitioner under these circumstances? The respondent's multiple negligence presents a case where the principle of de minimus should be applied. In fact, we believe that under the federal decisional law by this Court a motion to direct a jury against finding contributory negligence against petitioner would be properly sustained.

We therefore submit that any claim for reduction of damages on account of any negligence which might be attributable to petitioner is unreal and wholly lacking in substance and should not be the vehicle for further delay in requiring respondent railroad company to compensate your petitioner for serious injuries inflicted upon him by the respondent's admitted negligence, from which there is no escape except the flagrant, erroneous violation by the Illinois Courts of both the Constitution and the laws of the United States and by their refusal to conform to the federal decisional law announced by this Court.

## JURISDICTION

### I.

### This Court Has Jurisdiction to Review the Orders of the Illinois Supreme Court in the Mandamus Action.

Unlimited jurisdiction in mandamus is conferred upon the Supreme Court of Illinois by the Constitution of that State which provides in Article VI, Par. 2, as follows:

> "The Supreme Court * * * shall have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus*, and appellate jurisdiction in all other cases * * *"

The power, jurisdiction and authority of the Supreme Court of Illinois to issue a writ of mandamus is as broad and untrammelled as was the power, jurisdiction and authority of the King's Bench in England prior to the fourth year of the reign of James I. In discussing that question, the Illinois Supreme Court in *People ex rel German Ins. Co.* v. *Williams*, 145 Ill. 573 said:

> "The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of, the common law, prior to the fourth year of James I., (excepting certain statutes), and which are of a general nature, and not local to that kingdom, are by our statutes made the rule of decision until repealed by the legislature. Thereby the great body of the English common law became, as far as applicable, in force in this state."

One of the grounds upon which the Illinois Supreme Court entertains an original action for mandamus is that there is no other adequate remedy available to correct the wrong inflicted upon a litigant by an inferior court, and this jurisdiction is not confined to final orders, judgments and

decrees but may be exercised with respect to any interlocutory order which exceeds jurisdiction of the court. In the case at bar the Supreme Court of Illinois refused to follow its own pronouncement of the law germane to the writ of mandamus prayed for by your petitioner.

In *People ex rel Woll* v. *Graber*, 394 Ill. 362, the Illinois Supreme Court granted a writ of mandamus to expunge an interlocutory order of the Superior Court of Cook County involving federally created rights because the injured party could not appeal from the interlocutory order held to exceed the jurisdiction of the Superior Court, namely, an order requiring the United States Attorney for the Northern District of Illinois to withdraw his appearance for one of the defendants in an action to recover damages for alleged breach of contract. In that case the court said:

> "Neither the litigant, the attorney or the interest which the litigant or attorney represent, can appeal from such order. Nor is there any adequate remedy available to them other than the writ of mandamus from this Court.
>
> "The general power of this Court to issue a writ of mandamus to an inferior court to expunge from its records an order, judgment or decree which is void because entered without jurisdiction is settled by a long line of decisions."

In *People ex rel Prince* v. *Graber*, 397 Ill. 522, the Supreme Court of Illinois granted mandamus to expunge orders requiring a non-resident plaintiff to appear in the City of Chicago for pre-trial deposition and staying the prosecution of the action until he did appear and submit to examination in an action against the Railway Express Company to recover damages for negligence of the express company while transporting certain dairy cattle. See also *People ex rel Kerner* v. *Keeney*, 399 Ill. 611.

In the case at bar the questions presented are matters of national concern involving federally created rights which

have been indefensibly violated by the judgment of the Appellate Court of Illinois. If, as respondents contend, the judgment of the Appellate Court is not subject to review and correction by the Supreme Court of Illinois under the archaic appellate practice in that state in any other way than by the exercise by the Illinois Supreme Court of its mandamus jurisdiction, we submit that the denial of that remedy constitutes an illegal usurpation of substantive rights and an unwarranted refusal to abide by the rule of essential uniformity which this Court has said must be applied in all courts, state and federal, in these railroad cases.

This Court has had occasion, in connection with this same section of the Illinois Constitution, to deprecate the ineffectiveness of practice and procedure in Illinois in *Marino* v. *Ragen,* 332 U. S. 561, in which the concurring opinion states:

> "The Illinois scheme affords a theoretical system of remedies. In my judgment it is hardly more than theoretical. Experience has shown beyond all doubt that, in any practical sense, the remedies available there are inadequate. Whether this is true because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult, is beside the point."

**Because of the mongrel decisions and denial of appellate relief in Illinois, as is apparent to this Court in *Marino* v. *Ragen,* supra, and other decisions by the Illinois Supreme Court, the several different procedures of appeal were instituted by your petitioner. By profound study and legalistic analysis, the Supreme Court of Illinois has in a sense pronounced that if a litigant chose one method and not one of the other methods, the litigant erred in selecting the wrong appellate procedure.**

This can be likened only unto Aesop's Fable of the fox and the lamb; irrespective of the method or the excuse, the lamb was devoured. And likewise, was the result to the litigant here, because of the theoretical system of remedies in Illinois.

What constitutes a void order or judgment as distinguished from a judgment or order which is merely erroneous and correctable only on appeal, or by writ of error, has been stated by the Supreme Court of Illinois in *Armstrong* v. *Obucino*, 300 Ill. 140, as follows:

> "The statement has very frequently been made that where a court has jurisdiction of the parties and subject matter, its decree, however erroneous, can only be attacked on appeal or error; but the rule is subject to an exception equally well settled,—that a decree may be void because the court has exceeded its jurisdiction. * * * Courts are limited in the extent and character of their judgments, and if they transcend their lawful powers their judgments and decrees are void and may be collaterally impeached wherever rights claimed under them are brought in question. The doctrine that where a court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment or decree, however, erroneous, cannot be collaterally assailed, is only correct when the court proceeds according to the established modes governing the class to which the case belongs and does not transcend in the extent and character of its judgment or decree the law or statute which is applicable to it."

In *People ex rel Modern Woodmen of America* v. *The Circuit Court of Washington County*, 347 Ill. 34, it was held that jurisdiction of a court in a particular case includes not alone the power to hear the cause but likewise involves the power to render the particular judgment entered, and every act of the court beyond that power is void. See also *People ex rel Mike Maglori* v. *Joseph Siman*, 284 Ill. 28;

*People ex rel John A. Swanson* v. *James J. Kelly, Judge*, 352 Ill. 567.

We submit that the Appellate Court of Illinois by its judgment acted capriciously and arbitrarily and in flagrant defiance of the recent teachings of this Court. A search of the authorities discloses no case where there has been so gross and so brazen a miscarriage of justice in defiance of the controlling decisions of this Court.

There is a general principle in every enlightened jurisdiction that for every wrong there must be a remedy. It is embodied in the Constitution of Illinois in Article II, Par. 19, which provides:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obligated to purchase it, completely and without denial, promptly, and without delay."

Recognizing that the machinery for appeal in the State of Illinois to the Supreme Court of that state is elusive and subject to technicalities, your petitioner properly resorted to every means of review provided by the laws and rules of Illinois to obtain a review of the questions of his federally created rights which in the first instance were violated by the decision of the Illinois Appellate Court including an application to file a petition for writ of mandamus to require that court to expunge its judgment forever depriving petitioner of his rights under the Federal Boiler Inspection Act and depriving him of his unquestionable right to the benefits of the Federal Safety Appliance Act.

No cause in the history of English jurisprudence can be found where such a writ was more warranted and justified than in the case at bar. Historically under the English common law writs of mandamus or prohibition were resorted to in order to prevent a miscarriage of justice where the ordinary processes of court procedure and review were inadequate or ineffective in preventing such miscarriage.

No court, state or federal, has any right or authority to disregard the federally created rights of which petitioner has been deprived in the exercise of judicial discretion. On the contrary, the Supreme Court of every state, including Illinois, must zealously safeguard such federal rights at all times. Only in such a way can uniformity and unanimity be attained by all. All railroad employees, passenger and highway travelers* will be endangered as long as the decision of the Illinois Appellate Court in this cause remains unexpunged and unreversed. The power of the Supreme Court of Illinois to remedy the situation by mandamus cannot be abrogated if that is the only means open to it.

Therefore, in fairness and in justice to all carrier employees and the public, the writ prayed for should be allowed by the Court. Only in that way will the majesty and uniformity of the federal laws be firmly upheld and justice to all assured.

## II.

**This Court has Jurisdiction to Review the Judgment of the Appellate Court of Illinois and the Orders of the Supreme Court of Illinois Dismissing Petitioner's Writ of Error and His Petition for Leave to Appeal Which Are Final Judgments and Decrees Within the Purview of Title 28, United States Code, Sec. 1257 (3). In Any Event They are Subject to Review Under the Provisions of Title 28, United States Code, Sec. 1651 (a).**

### 1.

The judgment of the Illinois Appellate Court is a final judgment (A) under the Federal Law and (B) under the Illinois Law.

### A. Federal Law.

In the most recent decision of this Court on the question of finality of a judgment in *Dickinson* v. *Petroleum Conver-*

* Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589.

*sion Corporation*, 70 S. Ct. 322, decided January 16, 1950, Mr. Justice Jackson in the prevailing opinion stated:

> "The only issue presented by this case turns on the finality of a judgment for purposes of appeal, a subject on which the volume of judicial writing already is formidable. * * *
>
> "Half a century ago this Court lamented, 'Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. * * * The cases, it must be conceded, are not altogether harmonious.' * * * This lamentation is equally fitting to describe the intervening struggle of the courts; sometimes to devise a formula that will encompass all situations and at other times to take hardship cases out from under the rigidity of previous declarations; sometimes choosing one and sometimes another of the considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand, and the danger of denying justice by delay on the other."

Respondent's primary contention in No. 43 is that the Appellate Court did not render a final judgment or decree within the meaning of Title 28 U. S. C. § 1257 (3) contending that because the action was remanded to the Superior Court for a new trial it is not final, citing many ancient repudiated decisions of this court reported in Howard, Wallace and Wheaton Reports and in the early volumes up to 183 United States Reports. Among these early cases especially relied upon by the respondent is *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130, in which it was held that this Court is precluded by the face of the judgment and the respondent quotes the judgment of the Appellate Court in this case. We submit that "the old 'face of the judgment' rule" has been abrogated by this Court in its more recent decisions on this now settled question. We call attention to

the fact that the remand for a new trial was not a general remand for the retrial of all the issues, but was only a remand for further proceedings "in conformity with the opinion of this Court this day filed herein". Under that opinion petitioner is precluded from any right to relief for the violation by the respondent railroad company of the provisions of the Boiler Inspection Act.

In *Gospel Army* v. *City of Los Angeles*, 331 U. S. 543, this Court immediatey following the respondent's quotation from that case (Resp. Brief in No. 43 pp. 10-11) went on to say:

> "Increasingly this court has become less formal in the matter of final judgment. It is no longer the rule that the face of the judgment is determinative of whether it is final. (Referring in footnote 4 specifically to *Haseltine* v. *Central Bank of Springfield*, 183 U. S. 130). Today the 'test is not whether under local rules of practice the judgment is denominated final * * * but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court * * *'."

Why did the respondent omit the crux of the foregoing paragraph in the case of *Gospel* v. *City of Los Angeles*, supra? Certainly the reason is obvious for the decision here clearly and manifestly affirms the petitioner's contention that in the case at bar your petitioner's rights under the Federal Boiler Inspection Act have been forever barred and wrongfully denuded from his complaint.

By the same token respondent's reliance upon *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99 is unavailing. That decision proceeded upon the now discarded theory that the face of the state court judgment controls the question of finality with respect to the jurisdiction of this Court to review it. The face of the judgment is now as dead as the dodo bird. By this metamorphasis this Court

has mandatorily advised all state supreme and inferior courts of the nation that they will not be permitted to hide behind the shredded skirt of the heretofore existing face of the judgment rule now repudiated wherever litigants have been deprived of their life, liberty and property guaranteed to them by the Constitution and decisional laws of this Court.

The test of finality is therefore not limited to the face of the judgment but extends to the opinion and to other pertinent factors within and without the record. *Department of Banking* v. *Pink*, 317 U. S. 264, 268; *Richfield Oil Corporation* v. *State Board*, 329 U. S. 69, 72. The facts in these cases clearly indicate and respondents do not dispute that the opinion and order of the Appellate Court is final on any new trial under the Appellate Court's opinion with respect to his right to recover under the Federal Boiler Inspection Act. Petitioner in his complaint alleged three distinct or different causes of action or claims for relief.

1. Violation of the Federal Employers' Liability Act.
2. Violation of the Federal Boiler Inspection Act.
3. Violation of the Safety Appliance Act.

Illinois practice permits a plaintiff "to unite in one count various causes of action growing out of the same circumstances and to eliminate the necessity of separate counts as to separate causes of action formerly required under the common law of Illinois." *Sperry* v. *Wabash R. Co.*, (D. C. E. D. Ill. 1943) 52 F. Supp. 337, 338; *Mitchell* v. *Geister*, 337 Ill. App. 390, 86 N. E. 2d 293 (1949).

The Illinois Appellate Court ruled as a matter of law that, although there was an issue of fact as to the defective condition of the rear headlight, there could be no recovery under the Federal Boiler Inspection Act because under its interpretation of that Act and Rules 129 and 131 of the Interstate Commerce Commission no rear headlight was required in view of the unalterable facts that the locomotive at

the time of the accident was being used in road service and was backing in a terminal movement to couple on to its train.

The significance of the court's ruling is that petitioner on remand of this case is precluded from obtaining recovery or relief under the cause of action or claim for relief based on the Boiler Inspection Act. The opinion of the Appellate Court is the law of the case binding on the trial court. *Schneiderman* v. *Interstate Transit Lines, Inc.*, 401 Ill. 172; *The Town of Kaneville* v. *Meredith*, 361 Ill. 556. It is apparent in view of the basis upon which the Illinois court rests its decision that no new, different or additional evidence can be introduced which would permit petitioner to recover under the Boiler Inspection Act. Under these circumstances the cause of action or claim for relief founded on the Federal Boiler Inspection Act has been deleted from the complaint and finally adjudicated.

The more realistic, just and enlightened view which this Court in its recent decisions has taken with respect to the question of finality of judgments and orders for purposes of review as opposed to the now abandoned old "face of the judgment rule" upon which respondents rely, is evidenced by the adoption by this Court of Rule 54-B of the Federal Rules of Civil Procedure and its decision under that rule in *Reeves* v. *Beardall*, 316 U. S. 283, where it was said:

> "Such a separate judgment will frequently be a final judgment and appealable though no disposition has been made of the other claims of the action. Bowes v. Commercial Casualty Ins. Co., 4th Cir. 107 F. (2) 169, 170. That result promotes the policy of the rules in expediting appeals from judgments which 'terminate the action with respect to the claim so disposed of' though the trial court has not finished with the rest of the litigation."

We have, therefore, proven that the United States Supreme Court has jurisdiction to review the case at bar, and

reinstate the rights of your petitioner to the protection of both the Boiler Inspection Act and the Safety Appliance Act by reversing the erroneous decisions of the Illinois Appellate Court. In doing so, the Supreme Court of the United States will direct the Illinois Appellate Court to a more proper and fitting understanding of the Federal rights herein involved; and will remove the blinking incredulous assumption that a bad back-up headlight permanently affixed to an engine used in the night season is better than no light at all, thereby protecting human life as was intended when Congress adopted the Federal Boiler Inspection Act.

**B. Illinois Law.**

Under the law, practice and decisions of the State of Illinois, the judgment of the Illinois Appellate Court is a final judgment in view of the refusal by the Supreme Court of Illinois to grant leave to appeal from it and the dismissal by that court of petitioner's writ of error.

There can be no doubt whatever that the Appellate Court's opinion forecloses any recovery under the Federal Boiler Inspection Act. Under Illinois law where one cause of action or claim for relief has been finally adjudicated and one or more other claims for the same relief remain pending, the adjudication of one of the claims is final and appealable.

*Roddy* v. *Armitage Hamlin Corporation,* 401 Ill. 605 (1949) is conclusive on this proposition. In that case plaintiff brought an action to have a lease declared null and void. The claim for cancellation was based upon (1) violation of Section 72 of the Business Corporation Act, and (2) for fraud. The claim for cancellation upon the ground of violation of the Business Corporation Act was dismissed and while the action was still pending with respect to the claim for cancellation on the ground of fraud, plaintiff prosecuted an appeal from the order dismissing the claim for cancellation because of alleged violation of the Business Corporation Act and the question was presented as to whether that

order was final and appealable under Section 77 of the Illinois Practice Act. The Supreme Court of Illinois held that the order was final and appealable.*

As before pointed out, practice in Illinois permits the plaintiff to unite in one count any number of causes of action growing out of the same circumstances and the form of the complaint does not affect the right to appeal if, in fact, a separate claim or cause of action can be construed to have been finally adjudicated. *Sperry* v. *Wabash R. Co., supra; Mitchell* v. *Geister, supra.*

In this case your petitioner applied to the Appellate Court for leave to appeal to the Illinois Supreme Court and after denial of that application applied to the Supreme Court for leave to appeal which was likewise denied. He also sued out a writ of error which the Supreme Court had constitutional authority to entertain under Article VI Par. 11 of the Constitution of that State. Such jurisdiction is not affected by any statutory restriction limiting jurisdiction of that court with respect to the finality of the judgment to be reviewed.

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**Roddy* v. *Armitage Hamlin Corporation, supra:* "A final order has been variously defined. In general, to be final and appealable, an order or decree must terminate the litigation between the parties on the merits of the cause, so that, if affirmed on review, the trial court has only to proceed with the execution of the order or decree. (Rogers v. Barton, 375 Ill. 611; Free v. The Successful Merchant, 542 Ill. 27) While this definition is well established and ordinarily applicable, other less restrictive expressions have frequently been expounded. For example, we have recently held that a final judgment is one finally disposing of the rights of the parties on the merits of the general controversy, or it may be a judgment on the merits of only one definite and separate branch of the general controversy, if the effect of the decision is the final disposition of the litigation. (Moffat Coal Co. v. Industrial Com. 397 Ill. 196; Brauer Machine and Supply Co. v. Parkhill Truck Co. 383 Ill. 569). Furthermore, it is settled that even the final determination of a collateral matter distinct from the general subject of litigation and settling the particular issue as between the parties is a final and appealable order. (Wyman v. Hageman, 318 Ill. 64; Sebree v. Sebree, 293 Ill. 226). Approaching the problem from another viewpoint, a decree retaining jurisdiction for future determination of matters of substantial controversy between the parties is not final (Rettig v. Zander, 364 Ill. 112; People ex rel Nelson v. Stony Island State Savings Bank, 355 Ill. 401) but an order is final for purposes of review where only incidental matters are reserved for future consideration (Groves v. Farmers State Bank, 368 Ill. 35; Eich v. Czervonko, 330 Ill. 455), and, *lastly, an order may be a final and appealable determination even though matters of substantial controversy remain to be disposed of in the trial court.* Newberry Library v. Board of Education, 387 Ill. 85; Hoier v. Kaplan, 313 Ill. 448." (Italics ours)

Therefore the decision of the Supreme Court of Illinois denying the petitioner's writ of error is a final judgment under the Illinois law.

It is the settled law of Illinois that where a constitutional question arises for the first time in the Appellate Court, the Supreme Court has jurisdiction to review the judgment of the Appellate Court by writ of error and on such writ to review all questions presented in the record. *Dinofria* v. *Brotherhood of Teamsters,* 399 Ill. 304, pp. 306-7, cert. denied, 335 U. S. 815; *Cuneo* v. *City of Chicago,* 272 Ill. 473, and the other authorities cited on page 30 of petition in No. 125.

The basic philosophy of the "final judgment rule" is to "avoid the evils of a piecemeal review." *Republic Natural Gas Co.* v. *State of Oklahoma,* 334 U. S. 62, 67.

Would the review in this case by the Supreme Court result in a "piecemeal review" or to rephrase the question, would review at this stage of the proceeding fully adjudicate the rights of the petitioner and of the respondent railroad company?

It is submitted that if this court reviewed the case on the merits, its adjudication would not be subject to further review by a state court. *Department of Banking* v. *Pink,* 317 U. S. 264, 268.

As previously stated, this case consists of three causes of action or claims for relief. Respondent admits liability under the Federal Employers' Liability Act.

It is patent that the Illinois Appellate Court erred as a matter of law in holding that the respondent railroad company did not violate the Federal Boiler Inspection Act. Similarly, the court usurped the functions of the jury when it held there was insufficient evidence to sustain a violation of the Federal Safety Appliance Act, and this in the face of the fact that that issue was conceded and was not contested. *Tiller* v. *Atlantic Coast Line R. R. Co.,* 323 U. S. 574; *Wilkerson* v. *McCarthy,* 336 U. S. 53; *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350; *Brady* v. *Southern Ry. Co.,* 320 U. S. 476; *Hill* v. *Atlantic Coast Line R. R. Co.,* 336 U. S. 911.

If these adjudications are reversed, then all that remains is the ministerial function of the state court in reinstating the judgment for petitioner which was entered on the jury's verdict after a fair trial and under proper instructions.

The causes of action founded upon the Federal Boiler Inspection Act and Safety Appliance Act are both legally and factually proper remedies to which your petitioner is entitled. The facts, argument and brief submitted overwhelmingly substantiates your petitioner's rights to be afforded the protection under these acts.

Since there can be no legal defense of contributory negligence as we have shown in this brief, the sum awarded by the jury and judgment entered by the trial court is modest indeed. This litigation should be brought at an end, and your petitioner should be freed from any further embroilment of retrials and reappeals.

In fairness and with due regard to justice, the petitioner's writ for certiorari as prayed for should be allowed, the judgment of the Appellate Court of Illinois for the First District should be reversed, and the judgment awarded by the Superior Court of Cook County, Illinois, in favor of petitioner and against the respondent railroad company for the sum of $40,000.00 and costs should be affirmed.

Respectfully submitted,

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*Petitioner*

By HARRY G. FUERST
SCHWARTZBERG & BARNETT
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816 Connecticut Avenue
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SEP 16 1950
CHARLES ELMORE CROPLEY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950.

**No. 43**

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
*Petitioner,*

*vs.*

JOHN M. TUOHY, PRESIDING JUSTICE, GROVER C. NIEMEYER AND MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT,
*Respondents.*

## MOTION TO STRIKE REPLY BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

HAROLD A. SMITH,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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*Respondents.*

---

## MOTION TO STRIKE REPLY BRIEF AND SUGGESTIONS IN SUPPORT THEREOF.

---

Now come John M. Tuohy, Presiding Justice, Grover C. Niemeyer and Michael Feinberg, Justices, Constituting the First Division of the Appellate Court of Illinois for the First District, Respondents, by their counsel, and move the Court to strike the Reply Brief filed by the Petitioner in support of his Petition for Writ of Certiorari, and in support of said motion tender unto the Court the attached suggestions.

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
EDWARD J. WENDROW,
*Counsel for Respondents.*

## SUGGESTIONS IN SUPPORT OF MOTION TO STRIKE REPLY BRIEF.

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In availing themselves of the privilege of a reply brief, counsel have so far exceeded propriety in heaping inaccurate abuse and invective upon the Appellate and Supreme Courts of Illinois, the judicial system of Illinois, and counsel for respondents that it is almost impossible to separate wheat from chaff, hyperbole from fact.

The reply brief has apparently been filed on the theory that if a sufficient torrent of abuse is directed at the Illinois Courts, petitioner can overcome his jurisdictional obstacles in securing review by this Honorable Court. This method of advocacy should neither be tolerated nor encouraged.

Inexperienced advocates sometimes may be carried away by avidity but in a case handled by seasoned counsel our highest court should not be compelled to find each point allegedly involved obscured by unhelpful calumny. We refer to such unjustifiable outbursts as (italics ours):

> "* * * *inquitous disregard* by the [Illinois courts] of petitioner's statutory and constitutional rights" (p. 2).
>
> "* * * rights * * * *despoiled and destroyed* by the Illinois courts" (p. 2).
>
> "What chance would this Petitioner have on a second or third appeal to the Supreme Court of Illinois in view of *its conduct in refusing to correct the gross injustice* which the Appellate Court has inflicted upon the Petitioner" (p. 2).
>
> "* * * the *brazen, flaunting disregard by the Appellate and Supreme Courts of Illinois,* of the laws of the Congress and the Constitution of the United States, the laws and Constitution of the State of Illi-

nois, and the clear emphatic decisions of this Court" (p. 6).

"[Counsel for Respondent's] *subterfuge* is as illusory as it is *insincere*" (p. 7).

"* * * There was no contest and it was in effect admitted at the trial that the brake on the coal car was inefficient" (p. 7. See also pp. 8, 9, 10)—in the face of the fact that the issue *was* contested and plaintiff's counsel themselves tendered instructions treating it as contested and permitting the jury to find either way on it (R. 251, 255).

The truncated quotation (pp. 9-10) from one of our briefs in the Appellate Court of Illinois with respect to the slope of the track when counsel well know that the first 12 pages of that Brief were a vigorous argument by us that counsel's assertions on appeal that the incline of the siding was toward the main line were a "perversion of the record"; that the witnesses testified, and were understood as so testifying, even by petitioner's counsel himself, that the slope was downward and away from the main line.

"* * * testimony can be likened unto *potter's clay in the hands of respondent's counsel*" (p. 10).

"The Illinois Courts *flagrantly* and erroneously violated both the Constitution and the Laws of the United States by their *refusal to conform* to the federal decisional law * * * and by their *arbitrary denial* of Petitioner's indisputable rights" (p. 11).

"* * * *false* and baseless claim" (p. 12).

"* * * *flagrant*, erroneous violation by the Illinois Courts of both the Constitution and the Laws of the United States and by their *refusal* to conform to the federal decisional law * * *" (p. 13).

"* * * respondent in the face of this *admitted testimony of entrapment* seeks a brass ring on his legalistic carousel, [*sic*]" (p. 12).

"* * * *illegal usurpation* of substantive rights and an *unwarranted refusal to abide* by the rule of essential uniformity * * *" (p. 16).

"Because of the *mongrel decisions and denial of appellate relief in Illinois*, as is apparent to this Court

in *Marino* v. *Ragen, supra,* and other decisions by the Illinois Supreme Court, the several different procedures of appeal were instituted by your Petitioner. By profound study and legalist analysis, the Supreme Court of Illinois has in a sense pronounced that if a litigant chose one method and not one of the other methods, the litigant erred in selecting the wrong procedure" (p. 16).

"If, as respondents contend, the judgment of the Appellate Court is not subject to review and correction by the Supreme Court of Illinois under *the archaic appellate practice in that state* * * *" (p. 16).

"* * * so gross and so *brazen a miscarriage* of justice in *defiance* of the controlling decisions of this Court" (p. 18).

The foregoing inaccurate and intemperate quotations are a sample of the material with which the Reply is studded. We will not dignify them by listing them all or answering them *seriatim.* However, respect for this Court, the Courts of Illinois and for ourselves does not permit them to go unchallenged. Each and all of those extravagant assertions are wrong in fact and wrong in law. We believe we are entitled to say:

1. The Illinois Bench is competent and conscientious. It had before it a simple case in which error under its interpretation of the "decisional law" of this Court was committed in the trial court. In addition, the damages awarded, we contend, were tenfold excessive regardless of contributory negligence. The case has been sent back for a new trial. We submit that the Illinois Appellate Court did not err in its interpretation, but, if it did err, this furnishes no justification for the contemptuous reply brief filed by petitioner's counsel.

2. Whatever may have been the merits of former Illinois criminal post conviction procedure (now changed by a Post-Conviction act, validity upheld in *People* v. *Dale,*

92 N. E. 2d 761), Illinois civil appellate procedure is neither "archaic", "technical" nor "elusive." In 1933, Illinois, under the guidance of Professor Sunderland, adopted an excellent Civil Practice Act. Professor Sunderland would scarcely have been chosen to assist in formulation of the federal rules if he had devised a system for Illinois one-half so fearsome as counsel endeavor to paint our simplified appellate procedure. Counsel's real complaint is that the Illinois Supreme Court lacks jurisdiction under the Civil Practice Act to review interlocutory Appellate Court judgments.

3. Whatever may be the merits or demerits of Illinois civil appellate procedure, Petitioner, an Indiana resident, voluntarily chose it over Indiana procedure. He did not sue defendant at Fort Wayne, Indiana, where the accident occurred. By the 15th day after the accident (Nov. 29, 1946, R. 109), he had come to Chicago, engaged counsel and was in the hands of a Chicago "expert" witness. The choice of Cook County, Illinois, as a forum obviously was not uninfluenced by the size of the verdict he hoped to obtain. Having voluntarily selected Illinois as the forum, Petitioner has little standing to complain of the procedure of the state he elected to go into.

4. The rash and unwarranted statements which tincture the Reply throughout are scandalous and impertinent.

Respectfully submitted,

HAROLD A. SMITH,
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EDWARD J. WENDROW,
*Counsel for Respondents.*

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IN THE

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*Respondents.*

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**PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO STRIKE HIS REPLY BRIEF.**

---

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*Respondents.*

## PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO STRIKE HIS REPLY BRIEF.

The object of respondents' identical motions to strike petitioner's identical reply briefs in Causes No. 43 and No. 125 is not to uphold the majesty of the law, the dignity of the Illinois Courts, the adequacy of Illinois appellate procedure, or the merits of the indefensible and undefended decisions of the Illinois Courts in this cause. It is the last desperate effort of the respondent railroad company to retain, and to prevent this Court from reviewing, the grossly unfair and unlawful advantage which those decisions have wrongfully bestowed upon it in destroying petitioner's federally created right to full redress for the serious injuries which were inflicted upon him by the admitted negligence of the railroad company just before midnight on November 14, 1946.

The railroad company attorneys, who appear as counsel for the Presiding Justice and the Associate Justices constituting the First Division of the Appellate Court of Illinois for the First District in Cause No. 43, have the temerity to say in the name of those Judges and of that Court, as they do in Cause No. 125, in the name of their real client, the railroad company (p. 4):

> "In addition, the damages awarded, we contend, were tenfold excessive regardless of contributory negligence."

In other words, arrogantly expropriating to themselves the function of the jury, these attorneys assess at not more than $4,000.00 two fractures of petitioner's pelvis, fracture of his left ankle joint, dislocation of his right shoulder resulting in permanent loss of 25% to 50% of the use of the right arm, and the other painful injuries, sustained when he was crushed and rolled for a distance of five to ten feet or more in the 6 to 10 inch space between the side of the tender and the side of the fouling coal car, all resulting in total disability from performing the only kind of work he has ever done to support himself and his family since leaving the Orphanage, and a loss of earnings to date of about $14,000.00.

It is small wonder that attorneys so biased, partisan, prejudiced, and callous, should take umbrage at petitioner's justified criticism of the unjustifiable decisions of the Illinois Appellate and Supreme Courts in this cause, which forever deprive him of the benefit of the provisions of the Federal Boiler Inspection Act on any new trial under the Appellate Court's decision, and also of the benefit of the provisions of the Federal Safety Appliance Act, although liability thereunder was admitted, proven and not contested at the trial, and which relegate him to years of litigation with a litigous railroad company which, unlike

petitioner, is financially well able to engage in litigation indefinitely. Neither this motion nor respondents' briefs in this Court challenge these basic propositions.

The Illinois Civil Practice Act was a notable effort, on the part of Professor Sunderland and his eminent and forward-looking associates, to eliminate archaic practice and procedure in Illinois, and to enable the Illinois Courts to dispense "justice freely, * * * completely and without denial, promptly, and without delay" as provided in the ancient and not-too-well drawn Constitution of Illinois of 1870, but adherence to old concepts and impediments of that inadequate Constitution have resulted in procedural problems, which still remain to be ironed out, and some of which this Court recently has had occasion to criticize in *Marino* v. *Ragen,* 332 U. S. 561, and in other cases.

We think this Court can take notice of the strong current movement in Illinois for the adoption of the so-called Gateway Amendment, concerning which the President of the Illinois State Bar Association, under date of September 10, 1950, circularized the members of that Association in part as follows:

"September 10, 1950

*To Members of the Illinois State Bar Association*:

The Illinois State Bar Association has long urged, and is presently supporting, the adoption of the Gateway Amendment which is designed to liberalize the procedure for amending the Illinois Constitution of 1870.

We have joined the Chicago Bar Association and forty other organizations to form the Illinois Committee for Constitutional Revision, which is carrying on a state-wide campaign for adoption of the 1950 Gateway Amendment at the general election in November.

At the February, 1949, meeting of our Board of Governors, the Association created its Committee for Constitutional Revision to actively engage in furthering this important work. * * *

If you can assist in this work, please notify Mr. Sears, at the above address, so that he can add your name to the Speakers Bureau list.

Sincerely yours,
A. L. Yantes
President."

It is shocking to find counsel for the respondents seeking to bolster their motion to strike petitioner's reply brief, because petitioner is a resident of Indiana and "has little standing to complain of" "Illinois civil appellate procedure (p. 5)." Petitioner, at the time he was injured, was admittedly employed in interstate commerce by the respondent railroad company, an interstate common carrier by railroad, one of whose principal termini is in the City of Chicago, Illinois. The Federal Employers' Liability Act (28 U. S. C. Sec. 56) confers upon interstate railroad common carrier employees the unqualified right to bring an action in any state court of competent jurisdiction in any district in which the defendant does business. No litigant asserting federally created rights should be denied their enforcement by any State Court or by deficiencies in state court procedure, and certainly no litigant asserting rights of any character should be penalized for failing to foresee the indefensibly erroneous, unfair and unjust decisions which have been rendered by the Illinois Appellate and Supreme Court in this cause.

Vituperous epithets and vicious innuendoes deliberately designed to arouse prejudice against petitioner, and to prevent a fair, calm judicial decision in this cause, which abounded in the briefs and arguments of the respondent railroad company in the state courts, reappear mildly in

paragraph 3, p. 5 of respondent's "Suggestions" but will not, we are confident, influence this Court's decision in favor of this motion or against petitioner's application for certiorari and the restoration of the modest judgment he properly obtained in the Superior Court of Cook County, Illinois.

Far from being scandalous or impertinent, we respectfully submit that petitioner's criticism of the decisions of the Appellate and Supreme Courts of Illinois are sound, amply justified and wholly within the bounds of proper decorum.

We respectfully submit that respondent's motion to strike petitioner's reply brief should be denied.

Respectfully submitted,

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With reference to the statement in the Appellate Court's opinion regarding the evidence of defendant's witnesses as to the slope of the spur track (Abst. 131, 134, 144, 147), namely,

> "The conductor testified the spur slopes to the west; the fireman, that it slopes away from the main track; and the engineer, that it is an incline to the West. * * *" Drift of the coal car toward the O.P Main was impossible under the uncontradicted evidence that the spur sloped to the West and away from the O.P. Main."

defendant's reply brief in the Appellate Court stated,

> "Reading the cold printed testimony of defendant's three witnesses we concede that the words used by two of them (McKinney and Thomas) may be ambiguous as to whether the Clifford siding sloped up or sloped down from the O.P. Main. * * *
>
> "The testimony of Farr that the siding 'slopes *away from* the O.P. Main' (Abst. 135) plainly connotes a downward slope away * * * that the only thing we had to go by were these few words. Without the aid of Farr's testimony we confess it may be embarrassing to tell which way the slant was".

In the face of this concession, plaintiff submits that if there were any *bona fide* issue with respect to the inefficiency of the hand brake or the slope of the Clifford siding, it was for the jury, and not for defendant's counsel or the Appellate Court, to determine what the fireman's testimony connoted and what the other two witnesses meant with regard to the slope of the Clifford siding. This is particularly true inasmuch as defendant offered in evidence defendant's Exhibit 2, a photograph of the Clifford siding, which shows quite plainly that the Clifford siding is on an upgrade after it gets a short distance away from the main track. "Away" refers to horizontal distance, and not to vertical direction.

## POINTS RELIED ON FOR REVERSAL OF JUDGMENT.

1. The Supreme Court of Illinois has jurisdiction over the case at bar.

   A. The complaint alleges two distinct rights of recovery, one of which has been erroneously and finally determined by the Appellate Court.

   B. The plaintiff has been wrongfully deprived of his right to a trial by jury, guaranteed to him by the 7th Amendment of the Constitution of the United States and Article II Section 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Article II Section 19 of the Illinois Constitution.

2. The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Boiler Inspection Act.

3. The Appellate Court grossly erred in misconstruing and failing properely to apply the Federal Safety Appliance Act.

4. Plaintiff is irreparably prejudiced and damaged by the decision of the Appellate Court.

5. The plaintiff has been wrongfully deprived of his right to a trial by jury guaranteed to him by the Constitution of the United States and of the State of Illinois.

## SUGGESTIONS AND AUTHORITIES.

### I.

**The Supreme Court of Illinois has jurisdiction over the case at bar.**

**A. The complaint alleges two distinct rights of recovery, one of which has been erroneously and finally determined by the Appellate Court.**

The plaintiff's complaint (Abst. 2-5) alleged two rights of recovery:

(1). A right of recovery under the Federal Employers' Liability Act based on negligence of the defendant railroad.

DEFENDANT ADMITS IT IS LIABLE UNDER THIS ACT.

(2). A right of recovery under the Federal Boiler Inspection Act and the Federal Safety Appliance Act.

The Appellate Court of Illinois held that there is no liability in the case at bar for the defendant's violation of the Boiler Inspection Act and the Safety Appliance Act, thus erroneously and finally disposing of plaintiff's rights of recovery under these Federal safety statutes.

The opinion finally determines in the case at bar that one of his rights of recovery or, differently expressed, one of the causes of action asserted in the complaint, does not exist, and bars the plaintiff from recovering for violations by the defendant of the Federal Safety Statutes on any new trial, despite the fact that the evidence amply and clearly warranted the jury to find that both Acts were violated and that both violations contributed to cause plaintiff's injuries.

In the recent cases of *Newberry Library* v. *Board of Education,* 387 Ill. 85 (1944) and *Roddy* v. *Armitage Hamlin Corporation, Inc.,* 401 Ill. 605 (1949), this Court held

that where a complaint contains two causes of action and one cause of action is disposed of and the other one remains pending, the order disposing of the one cause of action is a final order within the purview of appellate procedure, and is reviewable by this Court.

Here there is a similar deprivation of a right and a final adjudication thereof in that the plaintiff's rights under the Federal Boiler Inspection Act and Safety Appliance Act have, by the Appellate Court's opinion, been eliminated from consideration by the jury on any new trial.

This right of recovery under the Federal Safety Statutes as set forth in the complaint is the same as if it were enumerated as a separate cause of action and is separate and distinct from his cause of action for negligent injury under the Federal Employers' Liability Act. The Appellate Court, having erroneously finally determined one of the rights, *idem est,* one of the causes of action,[1] the Supreme Court of Illinois is empowered to review the erroneous decision of the Appellate Court. As the only means in the case at bar of effectuating the "desirable uniformity in adjudication of federally created rights", *Brown* v. *Western Railway of Alabama,* 70 S. Ct. 105, this court should review and correct the Appellate Court's erroneous judgment in this cause.

**B. The plaintiff has been wrongfully deprived of his right to a trial by jury, guaranteed to him by the 7th Amendment of the Constitution of the United States and Article II Section 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Article II Section 19 of the Illinois Constitution.**

See discussion under Point V post.

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[1]**Ross v. Schooley, 237 Fed 290.**

## II.

**The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Boiler Inspection Act.**

The Federal Boiler Inspection Act (45 U. S. C. Sec. 23) provides:

> "It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29 30 and 32 of this title and are able to withstand such test or tests as many be prescribed in the rules and regulations hereinafter provided for."

The tender of the locomotive involved in this action was equipped by the defendant with a rear light permanently affixed to the tender and forming a permanent and integral part of it (Abst. 167). Therefore, the rear light became and was a part and an appurtenance of the locomotive, physically in fact and in legal contemplation. *Tiller* v. *Atlantic Coast Line Railroad,* 323 U. S. 574; *Southern Pacific Co.* v. *Lunsford,* 297 U. S. 398; *Hines* v. *Smith,* 275 Fed. 766.

The plaintiff testified that the light was out of order and looked like the reflector was off and that it cast the light up in the air at an angle of about 45 degrees instead of along the tracks as it was intended to do, leaving the area for a distance of fifty to seventy-five feet immediately in the rear of the tender in darkness and that he was unable to see the coal car which fouled the main track

as the locomotive and tender backed west toward and past the Clifford siding until he was within ten or twelve feet of the coal car.

The defendant's witnesses testified that had there been any defect in the light, it would have required but a few minutes to have remedied it (Abst. 168).

The opinion of the Appellate Court stated:

> "In support of his action under the Boiler Inspection Act plaintiff testified that the light on the rear of the tender was out of focus, throwing its ray up instead of down toward the track. Members of plaintiff's crew contradict this testimony, and an issue of fact to be determined by the jury was created if this alleged defect in the light can be made the basis of an action under the Boiler Inspection Act."

However, the Appellate Court held that since the Interstate Commerce Commission rules with reference to rear or back-up lights on tenders did not require any light on the tender in question at the precise time of plaintiff's injuries because the locomotive was then being used in road service, no violation of the Federal Boiler Inspection Act could be predicated on the condition of the light.

The Interstate Commerce Commission rules, and its right or authority to promulgate rules, are purely ancillary to and in aid of the Federal Boiler Inspection Act and do not supplant its positive and basic command. The Appellate Court erroneously held, however, that it was necessary for the Interstate Commerce Commission to promulgate a rule, covering the precise movement or *use* of the locomotive and the particular and exact situation at the moment of injury, before any right of recovery can be predicated on a defective appurtenance, which is out of order and not in proper condition. In other words,

it held in effect, that **a bad light was better than no light,** and since no light was required by the rules of the I.C.C., and the bad light did not "create" an additional peril, no violation of the Boiler Inspection Act can be based on the condition of the light. Therefore, the Appellate Court erroneously deprived plaintiff of any right to recover under the Federal Boiler Inspection Act, itself.

The Appellate Court's opinion stated:

> "Defendant being under no obligation under the Boiler Inspection Act to provide a light on the rear of the tender, it is not liable under that act if a light installed, but not required by the act, was not properly focused. No claim can be made that the projection of the rays of this light into the air created an 'unnecessary peril to life or limb' in the operation of the engine."

Plaintiff submits that this ruling is clearly contrary to to the provisions of the Federal Boiler Inspection Act and to all of the decisions of the United States Supreme Court bearing on the subject, to which this Court, in *Williams* v. *New York Central R. Co.*, 402 Ill. 494, has wholeheartedly subscribed. The ruling finds no support in any authoritative or persuasive decision of any court in the nation, state or federal.

The decision of the Appellate Court in failing to recognize the fundamental requirement of the Boiler Inspection Act has denuded this Act of its primary, positive, clear command, namely: forbidding the use of any locomotive, boiler, or tender, and all parts and appurtenances thereof, which are not in proper condition and safe to operate in the service to which they are put without unnecessary peril to life or limb. Under this statute it was the defendant's duty to provide a safe locomotive and tender and all parts and appurtenances of both, irrespective of the rules of the Interstate Commerce Commission. The

rear light on the tender was a part and appurtenance of the locomotive and tender; and it was for the jury, and not for the Appellate Court, to determine whether or not unnecessary peril contributing to plaintiff's injuries were caused or created or was not avoided by the improper condition of the light. The Appellate Court seeks to substitute the rules of the Interstate Commerce Commission for the positive command of the Boiler Inspection Act. The Boiler Inspection Act is the basic, prime and dominant command from which arises the right of recovery for any defect of any part or appurtenance of a locomotive or tender, irrespective of the minimum requirements under any rules promulgated by the Interstate Commerce Commission.

No ruling or regulation by the Interstate Commerce Commission is necessary to bring within the scope or command of the statute a rear light which was in fact installed by the defendant on the tender as a permanent, integral and essential part thereof, and the fact that the Interstate Commerce Commission has promolgated rules regarding rear lights **does not exempt from the statute a light or any other part or safety device which is actually and in fact a part or appurtenance of a locomotive or tender.**

In *Tiller* v. *Atlantic Coast Line Railroad Co.,* 323 U. S. 574, the locomotive was ordinarily used in road service and did not have any rear light. It was pushing a string of cars which would have obscured the light if there had been one. Holding that the Trial Court was correct in permitting recovery for violation of the Boiler Inspection Act, the Supreme Court said:

> "It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death.
>
> • • •

"Assuming, without deciding, that the railroad could consistently with Rule 137 obscure the required light on the rear of the engine, it does not follow that, as a matter of law, failure to have the light did not contribute to Tiller's death. The deceased met his death on a dark night, and the diffused rays of a strong headlight, even though directly obscured from the front, might easily have spread themselves so that one standing within three car lengths of the approaching locomotive would have been given warning of its presence, or at least so the jury might have found. The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard. *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29, 33, 64 S. Ct. 409. And 'The standard of care must be commensurate to the dangers of the business.' *Tiller* v. *Atlantic Coast Line Railroad, supra,* 318 U.S. at page 67, 63 S. Ct. at page 451, 87 L. Ed. 610, 143 A.L.R. 967."

In the case at bar the backward movement of the engine was potentially perilous to the plaintiff, who was required to ride through a dark, unlit railroad yard on the stirrup at the side of the tender with an inefficient headlight. If the headlight were properly focused, so that its rays of light shone along the ground instead of up into the sky, the plaintiff's life and limb would not have been unnecessarily jeopardized. The position of the coal car fouling the main track would have been seen in time to avoid injury. The opinion of the Appellate Court deprives the plaintiff for all time from any recovery under the Federal Boiler Inspection Act. To permit such a final decision to remain the law of the case at bar would be a travesty and a mockery of justice both as against this plaintiff and as against the very purpose of the Congressional Act for the protection of railroad employees.

In *Urie* v. *Thompson* (decided May 31, 1949) 69 S. Ct. 1018, an action to recover damages for silicosis, it was contended, and the Supreme Court agreed, that the Rule of the I.C.C. relating to sanders was not intended as a protection against silicosis, but was intended merely to afford additional braking power, and under the "conventional tort doctrine" would not impose absolute liability. Holding that the Boiler Inspection Act itself, irrespective of purpose of the rule, provided the right of recovery, the Supreme Court said:

> "* * * we think the liability imposed by the Boiler Inspection Act is of broader character and that the correct rule is the one laid down in *Louisville & N. R. Co.,* v. *Layton,* 243 U. S. 617, 621, which this Court has had repeated occasion to apply in connection with the Safety Appliance Acts: 'The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in, or the work which he may be doing at the moment he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever failure to obey these Safety Appliance Laws is a proximate cause of injury to them when engaged in the discharge of duty'."

**Here again the United States Supreme Court calls attention to the fact that the Boiler Inspection Act provides the basis of the rights for recovery by railroad employees who are injured as a result of unnecessary peril arising from the use of a locomotive which a jury was warranted in finding was not in proper condition and safe to operate in the service to which it was put, even though the rule of the I.C.C. was not intended as protection from silicosis.**

In *Lilly* v. *Grand Trunk Western Railroad Co.*, 317 U. S. 481, 63 S. Ct. 347, the Supreme Court, held with respect to a rule of the Interstate Commerce Commission which was not called to the attention of the trial court, namely, a rule requiring the "Top of the tender behind the fuel space be kept clean, and means provided to carry off waste water", that the presence of ice on the top of the tender involved unnecessary peril to life and limb, and that the jury was justified in finding that the presence of ice constituted a violation of the Boiler Inspection Act even in the absence of such a rule. The Court said:

> "• • • Negligence is not the basis for liability under the Act. Instead it 'imposes upon the carrier an absolute and continuing duty to maintain the locomotive and all parts and appurtenances thereof, in proper condition, and safe to operate • • • without unnecessary peril to life or limb.' (Citing cases) Any employee engaged in interstate commerce who is injured by reason of a violation of the Act may bring his action under the Federal Employers' Liability Act, charging the violation of the Boiler Inspection Act. (Citing cases).
>
> "The Act, like the Safety Appliance Act, 45 U.S.C.A. Sec. 1 et seq., is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment. (Citing cases).
>
> "The use of a tender, upon whose top an employee must go, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated. • • •

"Respondent insists that reliance cannot be placed on Rule 153 because it was not called to the attention of the trial court or the jury and its injection now would involve deciding the case on issues not submitted to the jury. We do not regard this point as well taken. * * * The failure of petitioner's counsel to call Rule 153 to the attention of the trial court should no more deprive petitioner of its benefits than the failure to plead specifically the Federal Employers' Liability Act foreclosed the application of that Act on appeal to test the correctness of the trial judge's refusal to charge in *Grand Trunk Western Railroad Co.*, v. *Lindsay*, 233 U. S. 42, especially when, as here, *the rule only fortifies a result the jury could probably have reached even in the absence of such a rule.*" (Emphasis ours)

In that case, although the railroad company did not place the ice on the tender nor was there any defect of any part or appurtenance causing it to be there, but it came about from the unavoidable and uncontrollable operation of the natural elements, the presence of ice, irrespective of the effect of any rule of the Interstate Commerce Commission was definitely determined to authorize the jury to find a violation of the Boiler Inspection Act.

By the same token, a headlight which is out of order as the jury concededly was justified in finding with respect to the light in the case at bar, constitutes a violation of the Boiler Inspection Act, irrespective of any rule which the Interstate Commerce Commission had made or might make.

The decisional law of the United States Supreme Court on all phases of the federally created rights for redress for injuries sustained by interstate railroad employees is controlling on and must be applied by all courts, state and federal. And the United States Supreme Court uniformily has held that when a railroad company installs,

constructs and maintains on and as a integral part of a locomotive or tender any appurtenance, liability for proper maintainance of the appurtenance in an efficient manner is obligatory on the railroad company, by virtue of the provisions of the Boiler Inspection Act itself, irrespective of any order, actual or potential, of the Interstate Commerce Commission.

In *Hines* v. *Smith,* 275 Fed. 766, the Circuit Court of Appeals for the Seventh Circuit affirmed a plaintiff's judgment which depended on the applicability of the Boiler Inspection Act to the defective condition of an automatic bell ringer which was not prescribed or regulated by any rule promulgated by the Interstate Commerce Commission, saying:

> "It is claimed on behalf of the plaintiff, and evidence supports the contention, that the automatic bell ringer was out of order and would not ring on the night of the accident, and that it had been out of order for some time. In answer thereto, defendant asserts that this act does not apply to bell ringers, and that the declaration does not charge a violation thereof. With neither position can we agree. The amendment of 1915 (extending the provisions of the Boiler Inspection Act to all parts and appurtenances of the locomotive, whereas formerly the Act had applied only to the boiler) we think, leaves no room for doubt. Certainly a bell ringer is a 'part' or an 'appurtenance' of a 'locomotive and tender'. While a liberal construction of this statute is not necessary to justify this conclusion, it is evident that the amendment should be liberally construed and its obvious purpose effectuated."

On March 14, 1949, the United States Court of Appeals for the Eighth Circuit, in *Louisville & N. R. Co.* v. *Botts,* 173 F. (2d) 164, correctly analyzed the Boiler Inspection

Act in relation to orders of the Interstate Commerce Commission, namely, holding that the Act imposes three coordinate, and not simply coincident, conditions for the lawful use of a locomotive:

> "(1) All parts of the locomotive must be safe to operate without unnecessary peril to life or limb; (2) the locomotive must have been submitted to the inspection provided for in the Act; and (3) the locomotive and its parts must meet such tests and conform to such standards as the Interstate Commerce Commission may have prescribed or approved."
>
> "These on their face are coordinate conditions and commands, and the clauses therefore are not simply coincident. Thus, under the third clause, the Interstate Commerce Commission could hardly practicably be expected to lay down specifications of every individual item or element involved in the construction of the locomotive and its parts, but plainly Congress did not intend that any such non-prescription by the Commission should operate to relieve a carrier of its absolute obligation under the first clause, not to use any locomotive that is unsafe to operate, without unnecessary peril to life or limb, in the service to which it is put. The mere fact therefore that the third clause of the section of the statute has not been violated does not permit of a judicial ruling that there consequently in the present situation has been no violation of the first clause."

There is no longer any question in this State but that the federal decisional law must be applied to cases arising under the Federal Employers' Liability Act, supplemented by the Federal Boiler Inspection Act and the Federal Safety Appliance Act.

This Court in *Williams* v. *New York Central R. Co.*, 402 Ill. 494, 84 N.E. (2d) 399, has recently given firm ad-

herence to the pronouncements and trend of the more recent decision of the United States Supreme Court, saying:

> "In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States, *Ellis* v. *Union Pacific Railroad Co.*, 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572; *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 239, and it is clear from its recent decisions that the authority of courts to withdraw from the consideration of a jury the question of a defendant railroad company's negligence and its proximate relation to the injury is now very restricted indeed. (Citing cases).
>
> • • •
>
> 'The right to trial by jury is a part and parcel of the remedy afforded railroad workers under the Federal Employers' Liability Act. *Bailey* v. *Central Vermont Railway Co.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. *Blair* v. *Baltimore & Ohio Railroad Co.*, 323 U. S. 600, 65 S. Ct. 545, 89 L. Ed. 490; *Bailey* v. *Central Vermont Railroad Co.* 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444.' "

The plaintiff submits that the Appellate Courts' reliance on the decison in *Auschwitz* v. *Wabash Railroad Co.*, 346 Ill. 190, decided in 1931 before the 1939 amendments of the Federal Employers' Liability Act and the current unmistakable trend of the decisions of the United States Supreme Court in relation to these railroad cases, is untenable. The United States Court of Appeals for the 2nd Circuit in *Bolan* v. *Lehigh Valley Railroad Co.* (May 10, 1948) 167 F. 2d 939, on almost identical facts as those

involved in the *Auschwitz* case, said:

> "Accordingly, if an appurtenance conforms with the I.C.C. regulations but nevertheless violates the Act, the latter must control."

We submit that the cases of *Mahutga* v. *M. St. P. & S. S. M. Ry. Co.,* 182 Minn. 262, and *A. T. & S. F. Ry. Co.* v. *Scarlett,* 300 U. S. 471, are clearly distinguishable from the situation in the case at bar.

In the *Mahutga* case, the plaintiff claimed a violation of the Boiler Inspection Act because the railroad company did not provide some means of fastening the cab curtain back, although no such requirement was contained in the order of the Interstate Commerce Commission prescribing in detail the requirements with respect to such curtains. The curtains, in fact, conformed strictly to the requirements of the Interstate Commerce Commission. It was not claimed, as it is in the case at bar, that there was anything out of order, defective or not properly functioning with respect to the appurtenance.

In the *Scarlett* case, the claim was that a ladder on a box car, which was not defective and which complied with the regulations of Interstate Commerce Commission, violated the Boiler Inspection Act because round brace rods on the side of the car which formed no part of the ladder itself rendered the use of the ladder dangerous despite the fact that the ladder cleared the brace rod more than the minimum distance required by the order of the Interstate Commerce Commission for such clearance.

In the case at bar, unlike those cases, there is, as the Appellate Court has said: "An issue of fact to be determined by the jury * * * if * * * (the) defect in the light can be made the basis of an action under the Boiler Inspection Act".

Contrary to the statement in the opinion of the Appellate Court that

> "No claim can be made that the projection of the rays of this light into the air created 'unnecessary peril to life or limb' in the operation of the engine,"

the United States Supreme Court in *Tiller* v. *Atlantic Coast Line Railroad Co.*, 323 U. S. 574, said:

> "The backward movement of cars on a dark night in an unlit yard was potentially perilous to those compelled to work in the yard."

The Appellate Court's statement that the defective light could not be held to "create" an unnecessary peril to life or limb evidences a misapprehension with respect to the requirements of the Boiler Inspection Act. It is not necessary for a defective appliance to "create" an additional hazard, but it is required that all parts and appurtenances of a locomotive should be in such condition as to avoid unnecesary perils.

It cannot be reasonably contended that a light, affixed to the tender which was in such a condition that its light was thrown upward into the air instead of along the tracks as it was intended to be by the fixed focused method of application, entailed no unnecessary hazard and peril, or that such unnecessary hazard and peril would not have been avoided if the light had shone straight back along the tracks. If it had been in proper working order, it would have disclosed the close proximity of the coal car to the main track long before the situation was or could have been observed by the plaintiff or by the engineer. The violation of the Federal Boiler Inspection Act contributed to cause the plaintiff's injuries.

As was said in *Southern Pacific Ry. Co.* v. *Lunsford*, 297 U. S. 398, and as was held in *Lilly* v. *Grand Trunk Railroad Co.*, 317 U. S. 481, and *Hines* v. *Smith*, 275 Fed.

766, a defective part or appurtenance of a locomotive if actually a permanent and integral part thereof, which by reason of the defect fails to avoid unnecessary peril constitutes a violation of the Boiler Inspection Act, whether or not the part or appurtenance is required or covered by any order of the Interstate Commerce Commission.

The railroad company, knowing the service to which the locomotive was to be put, equipped it with a rear light with a fixed focus, the only purpose of which could have been to provide for safety when the locomotive was backing in the night season, as the locomotive in the case at bar was doing when plaintiff was injured. If it were out of order, entailing unnecessary peril which would have been avoided by having the light in proper condition, the jury was warranted in finding that the Boiler Inspection Act was violated, and that such violation contributed to cause plaintiff's injuries.

The Appellate Court's opinion finally determines the issues in this regard, and erroneously denies and deprives this plaintiff of protection under the Federal Boiler Inspection Act.

## III.

**The Appellate Court grossly erred in misconstruing and failing properly to apply the Federal Safety Appliance Act.**

The Safety Appliance Act provides: (45 U.S.C. Sec. 11)

> "It shall be unlawful for any common carrier subject to the provisions of sections 1-16 of this title to haul, or permit to be hauled or used on its line, any car subject to the provisions of said sections not equipped with appliances provided for in sections 11-16 of this title, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

Defendant's counsel took plaintiff's deposition in this cause on July 30, 1947, nearly ten months before the trial of this action (Abst. 36) and consequently it was well aware of plaintiff's claims and testimony. Plaintiff testified that when he passed the place where his accident subsequently occurred while he was on his way to report for duty at 9:15 or 9:30 P.M., he saw the coal car which was subsequently involved in his accident in the clear on the Clifford siding and a brakeman was setting the brake on it at that time, and that if it had remained in the position it was in when he saw the brake applied, his accident would not have occurred. He further testified, as is apparent even without testimony, that when the brake is put on, the car cannot move if the brake functions efficiently, and if the brake is not functioning efficiently the car will drift on a slope. Plaintiff further testified that if the car drifts when the brake is applied the brake is not efficient (Abst. 23-26).

After having taken plaintiff's deposition ten months before the trial, defendant's counsel, in opening defendant's case to the Court and jury at the outset of the trial, stated (Abst. 8):

> "Now I notice what Mr. Fuerst said about how the car got there. I do not know if it was put there or whether it had drifted there. In other words, if the brakes were defective in holding the car. But I do know the car was too close to this track to clear a man riding on it."

That statement is a plain and unequivocal admission that the Clifford siding sloped down toward the O. P. Main and was a plain statement that the defendant did not contest the fact that the brake on the coal car was defective and inefficient. The statement was never withdrawn or modified up until the time the case was

submitted to the jury, and represents the theory upon which the defense was based and is binding on the defendant. *Allen* v. *United States Fidelity & Guaranty Co.,* 269 Ill. 234; *Peters* v. *General Rug & Carpet Cleaners,* 333 Ill. app. 47; *Kluska* v. *City of Chicago,* 97 Ill. app. 665.

Defendant did not offer any evidence of any character to rebut plaintiff's testimony that the brake was inefficient. It did not call the brakeman who put the coal car on the siding and applied the brake. It did not call anybody who had anything to do with moving the coal car after the accident, and it passes credulity to think that respondent left it in the position fouling the O. P. Main after it had caused injuries to one of its employees. It did not produce any profile map made on actual survey, as it certainly would have done if there were any honest question about whether the coal car drifted to its dangerous position or if there were any honest question as to its direction of the grade of the tracks.

If there was any legitimate issue as to direction of the slope or the inefficiency of the brake on the coal car, all questions relating to such issue were questions of fact for the jury which the Appellate Court cannot redetermine contrary to the determination of the jury in this case, which is governed by the Federal Employers' Liability Act and the Safety Appliance Act.

*Lavender* v. *Kurn,* 327 U. S. 645.
*Williams* v. *New York Central R. Co.,* 402 Ill. 494.
*Cusson* v. *Canadian Pacific Ry Co.,* 115 F. 2d 430.

In *Lavender* v. *Kurn,* 327 U. S. 645, it was said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded

men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate Court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

The testimony offered by plaintiff with respect to the inefficiency of the hand brake, that is, its failure to function and to keep the coal car from drifting (Abst. 23-26), is substantial evidence and was sufficient to make the issue one for the jury within the decision of the United States Supreme Court in *Myers* v. *Reading Co.*, 331 U. S. 477; *Didinger* v. *Pennsylvania R. Co.*, 39 F. 2d 798 and *Philadelphia & R. R. Co.* v. *Auchenbach*, 16 F. 2d 550, that the hand brake on the coal car was inefficient.

To the same effect:

*Spotts* v. *Baltimore & Ohio R. Co.*, 102 F. 2d 160.
*Detroit T. & I. R. Co.* v. *Hahn*, 47 F. 2d 59.
*Anderson* v. *Baltimore & O. R. Co.*, 89 F. 2d 629, Cert. denied, 302 U. S. 696.
*Eker* v. *Pettibone*, 111 F. 2d 451.
*Anderson* v. *Chesapeake & O. R. Co.*, 352 Ill. 561, 186 N. E. 185.

The Appellate Court, in stating:

"No inference of inefficiency of the brake can be drawn from the mere fact that plaintiff saw a switch-

> man setting the brake—an incomplete operation— * * * It must first be shown that the brake was actually set, with due care and in the normal, natural and usual manner."

overlooked the wholly permissible and natural inference which the jury should be permitted to draw, namely, that a regular yard brakeman of defendant setting a brake would do so with due care and in the normal, natural and usual manner. This under these Federal Acts was within the province of the jury, and not within the province of the Appellate Court. Furthermore, the erroneous and gratitutious assumption by the Appellate Court in the use of the phrase "incomplete operation" is not borne out by the record. It only takes a fraction of a minute to set a brake. In railroad parlance, the plaintiff's testimony that he saw a regular yard brakeman setting the brake means that he saw the brake applied in a proper manner,—a complete operation, which twelve jurors believed to be the fact.

As this Court said in *Williams* v. *New York Central R. Co.*, 402 Ill. 494:

> "In actions under the Federal Employers' Liability Act the rule for measuring the sufficiency and amount of evidence necessary to justify the submission of the case to the jury is that established by the Supreme Court of the United States, * * * and it is clear from its recent decisions that the authority of courts to withdraw from the consideration of a jury the question of a defendant railroad company's negligence and its proximate relation to the injury is now very restricted indeed."

Again in *Brown* v. *Western Railway of Alabama*, 70 S. Ct. 105, (not yet officially reported) where the state court had sustained a demurrer to a complaint in conformity with the local rules governing pleadings, the United States Supreme Court said:

"Strict local rules of pleadings cannot be used to impose unnecessary burden upon rights of recovery authorized by federal laws. Whatever springs the State may set for those endeavoring to assert rights the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice, *Davis* v. *Weschler, supra* (263 US 22) at 24. Cf. *Maty* v. *Grasselli Chemical Co.*, 303 U. S. 197. Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federally created rights could not be achieved. *Lee Brady* v. *Southern R. Co.*, 320 U. S. 476, 479."

The principles, which this Court in the *Williams* case, *supra,* has said must govern in F. E. L. A. cases, and its instructions to the lower courts of this State in that regard, have been ignored and violated by the Appellate Court in the case at bar. To require the plaintiff to retry his case without the protection of the Safety Appliance Act, which the evidence clearly justified and which the Trial Court properly accorded him, not only destroys his rights under verdict and judgment correctly returned and rendered in conformity with the Act, but also deprives him of the protection Congress provided interstate railroad workers in the Federal Employers' Liability and the Safety Appliance Acts and guaranteed to him by the Constitution of the United States and of the State of Illinois.

It would be a travesty on justice for this Court to fail to follow the cardinal principle of law, embodied in Article II, Sec. 19 of the Constitution of this State, that for every wrong there shall be a remedy, and to fail or refuse, because of any supposed procedural difficulties, to reverse the judgment of the Appellate Court.

## IV.

**Plaintiff is irreparably prejudiced and damaged by the decision of the Appellate Court.**

The only question on any new trial of this action under the opinion of the Appellate Court will be the amount of the damages to be awarded to plaintiff by another jury. In view of defendant's admission of its liability under the Federal Employers' Liability Act, a recovery of damages by the plaintiff in some amount is certain, inasmuch as any negligence on the part of plaintiff which the new jury might find contributed to cause plaintiff's injuries would not bar, but would merely diminish, the amount of his recovery.

If the evidence on the new trial with respect to defendant's violation of the Federal Boiler Inspection and Federal Safety Appliance Acts be the same as it was on the first trial, plaintiff will be denied the benefits of the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 53, to the effect that he shall not

> "* * * be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Apart from the delay in the ultimate determination of the amount of damages to which plaintiff is entitled, the plaintiff, by the decision of the Appellate Court, has been and will continue to be deprived of a jury determination on a new trial, of the issues involved in his assertion of federally created rights under the Federal Boiler Inspection and Safety Appliance Act, that were properly determined by the jury and the Trial Court on the first trial in complete accord with the federal decisional law. On a new

trial, the Trial Court would be bound to conform to the opinion of the Appellate Court, and if the evidence be the same, the plaintiff would be deprived of his statutory rights provided for him by the Federal Safety Statutes, erroneously eliminated from this case by the Appellate Court. Any appeal by plaintiff which might lie from the judgment in his favor at the new trial, would have to be prosecuted beyond the Appellate Court to correct the errors now belaboring the case, and the only relief that could be granted would be to order a third trial in order to restore to the plaintiff the benefit and protection of the Federal Safety Statutes in accord with the judgment he has properly obtained.

In other words, the decision of the Appellate Court to the effect that plaintiff is not entitled to recover under the Boiler Inspection Act or the Safety Appliance Act is final, short of corrective action by reversal by this Court.

In these circumstances, we submit that it would be unconscionable to require plaintiff to go through the empty gesture of a new trial, particularly since the plaintiff has already lost over $10,000 in wages as a result of the injuries wrongfully inflicted on him by the defendant, with its attendant delay and expense, when this Court can now correct the situation, and conscientious observance of the law requires this Court to do so now.

## V.

**The plaintiff has been wrongfully deprived of his right to a trial by jury guaranteed to him by the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and has been denied equal protection of the law in contravention of the 14th Amendment of the United States Constitution and subjected to a judicial wrong in violation of Article II, Sec. 19 of the Constitution of the State of Illinois.**

Plaintiff asserts and claims that he has been denied the right to trial by jury of the factual issues relating to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act, in violation of the provisions of the 7th Amendment of the Constitution of the United States and Article II, Sec. 5 of the Constitution of the State of Illinois, and that he has been denied equal protection of the law by the decision of the Appellate Court in violation of the provisions of the 14th Amendment of the Constitution of the United States.

Plaintiff further asserts and claims that the decision of the Appellate Court has visited upon him a wrong for which there is no remedy except by review and reversal by this Court, and violates the provisions of Article II, Sec. 19 of the Constitution of the State of Illinois.

Plaintiff asserted and claimed his constitutional rights at the first opportunity, namely, in his motion in the Appellate Court for a rehearing and for leave to appeal to this Court (Add. Abst. from App. Ct. 273-300). Plaintiff's constitutional rights as above set forth were infringed and violated for the first time when the Appellate Court made and filed its decision on defendant's appeal from the judgment in plaintiff's favor. Plaintiff duly demanded (Abst. 1) and was properly accorded a trial by jury in the Superior Court of Cook County, and the factual issues with respect to his right to recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act were properly tried and submitted to the

jury in the Superior Court of Cook County. It was not until the Appellate Court handed down its decision to the effect that plaintiff was not entitled to recover under either of these safety statutes that his constitutional rights were invaded. He promptly and clearly claimed his constitutional rights at the first opportunity in his motions in the Appellate Court for a rehearing and for leave to appeal, (Add. Abst. from App. Ct. 273-300) and such claims were necessarily passed on by the Appellate Court when it denied the motions.

The plaintiff is here asserting federally created rights which, as this Court has held in *Williams* v. *N.Y.C. R.R. Co.*, 402 Ill., 494, are governed and must be determined according to the federal decisional law.

It is perhaps unnecessary in this Court to argue the question whether the law under the recent decisions of the United States Supreme Court has progressed with reference to the questions involved in the case at bar to the point which overrules or modifies the decision of the Supreme Court in *Minn. & S.P. R.R. Co.* v. *Bombolis,* 141 U.S. 211.

It is certain, however, as stated in Mr. Justice Douglas' concurring opinion in *Wilkinson* v. *McCarthy,* 336 U.S. 1, that by the recent decisions of the United States Supreme Court

> "The historic role of the jury in performing that function (whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected) * * * is being restored in this important class of cases."

As stated in *Bailey* v. *Central Vermont Ry.,* 319 U.S. 350

> "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence * * * it is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act * * * the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries' * * * to deprive these workers of

the benefit of a jury trial in close but doubtful cases is to take away a good portion of the relief which Congress has afforded them."

In *Brady* v. *Southern Ry. Co.,* 320 U.S. 476, it was said:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Art. VI, we are charged with assuring the act's authority in state courts. *Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.* * * * It is true that this Court has held that a state need not provide in F.E.L.A. cases any trial by jury according to the requirements of the Seventh Amendment. * * * But when a state's jury system requires the court to determine the sufficiency of the evidence to support a finding of a federal right to recover, the correctness of its ruling is a federal question." (Emphasis ours)

Again, with due apology for the repetition deemed justified to emphasize the inexorable resolution of the United States Supreme Court to enforce uniform and equal administration of the federally created rights of railroad employees, it said in *Brown* v. *Western Railway of Alabama,* 70 S. Ct. 105:

> " Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis* v. *Weschler, supra,* 263 U.S. at page 24; Cf. *Maty* v. *Grasselli Chemical Co.,* 303 U.S. 197. Should this Court fail to protect federally created rights from

dismissal because of over-exacting local requirements for meticulous pleadings, *desirable uniformity in adjudication of federally created rights could not be achieved.* See *Brady* v. *Southern R. Co.*, 320 U. S. 476, 479." (Emphasis ours)

The Appellate Court's opinion clearly demonstrates, and its decision constitutes, an invasion of plaintiff's constitutional rights by repudiating, without any justification, the jury's fact-finding function in this case as to plaintiff's right to recover under both safety statutes. Furthermore, in order to contravene and intercept the rights to a jury determination of the factual issues in that connection, and to the equal protection of the law, guaranteed to plaintiff by the Federal and State Constitutions, the Appellate Court ingeniously devised its own findings of fact contrary to those of the jury imported by its general verdict, and its own interpretation of the Boiler Inspection and Safety Appliance Acts, thereby completing its denial of plaintiff's constitutional rights.

It ignores the commands of the decisional law of the Supreme Court of the State and of the Nation, requiring uniform administration and equal protection of plaintiff's federally created rights.

It is now clear, from the language of the Court, and the actual decisions in the *Urie* and *Brown* cases, *supra*, that the twilight zone of destruction between substantive and procedural rights heretofore existing has been abolished; that the intent and purpose of the Congressional enactments in the Federal Employers' Liability Act, the Federal Boiler Inspection Act, and the Federal Safety Appliance Act, must be administered with equality and uniformity throughout the entire nation, whether the appeal for justice be to a Federal or to any State Court; and that all cases arising under these Federal Acts shall be determined as to substance, notwithstanding any local procedural law, in accordance with the federal decisional law.

In *Urie* v. *Thompson,* 69 S. Ct. 1018 it was said:

> "Whatever the effect of the state supreme court's ruling for further proceedings in the state courts, it could not impose such an alternative upon petitioner (waiving the right to a new trial). Local rules of practice cannot bar this Court's independent consideration of all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review."

As we have before pointed out, the Appellate Court's decision to the effect that the plaintiff cannot recover under the Federal Boiler Inspection Act and the Federal Safety Appliance Act is final and deprives the plaintiff of the equal protection of the law and "desirable uniformity in adjudication of federally created rights."

It is submitted that in the situation in which the plaintiff has been put by the decision of the Appellate Court, the only effective remedy open to him is by review and reversal of the Appellate Court's decision at this stage of the proceedings, and that any obstacle of a technical or procedural nature should not deter this Honorable Court in reviewing that decision. To all intents and purposes it is final as to plaintiff's right to recover under the Federal Safety Statutes. It is grossly and indefensibly wrong for which the plaintiff has no remedy except in the hands of this Court. This Court in the conscientious performance of its duty, and in the interest of justice and in conformity with the emphatic teachings of the United States Supreme Court in its recent decisions, should accept jurisdiction and grant plaintiffs right to appeal and ultimately reverse the erroneous judgment of the Appellate Court and restore his constitutional rights to this plaintiff.

**Date Upon Which Judgment of the Appellate Court Became Final.**

The judgment of the Appellate Court of Illinois for the First District was rendered on November 21, 1949. Within the time allowed by the rules of the Appellate Court of Illinois for the First District, the plaintiff filed a petition for rehearing which was denied on December 2, 1949, on which date the judgment of the Appellate Court of Illinois for the First District became final.

**Prayer for Leave to Appeal.**

Your petitioner, WILLIAM EDWARD WOODS, prays this Honorable Court to grant leave to appeal from the judgment of the Appellate Court of Illinois, for the First District, which was entered on the 21st day of November, 1949, and that on such appeal the judgment of the Appellate Court of Illinois for the First District be reversed and the judgment of the Superior Court of Cook County be affirmed, and for such other relief as may be proper.

Respectfully submitted,

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*Attorneys for the Petitioner.*

HARRY G. FUERST,
*Of Counsel.*